Docket No.: 07-0277
Bench Date: 8/15/07
Deadline: 8/16/07

M E M O R A N D U M

TO: The Commission

FROM: Ian Brodsky, Administrative Law Judge

DATE: August 6, 2007

SUBJECT: Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC
-vs-
Level 3 Communications, LLC

Verified Complaint and Request for Declaratory Ruling pursuant to Sections 13-515 and 10-108 of the Illinois Public Utilities Act.

Application for Rehearing.

RECOMMENDATION: Deny rehearing.

On June 25, 2007, the Administrative Law Judge issued an Order in this matter, finding, *inter alia*, that Level 3 violated Sections 13-514 and 13-702 of the Public Utilities Act ("Act"). The Commission denied Level 3's petition for review and adopted the June 25 Order on July 10, 2007. On August 6, 2007, Level 3 filed an application for rehearing ("AFR") which presents seven issues.[1] As detailed below, none of the arguments set forth in the AFR merits rehearing.

I.

First, Level 3 asserts that rehearing should be granted to litigate the terms of the status quo with respect to the agreement that Level 3 seeks to terminate.[2] The law, however, requires abatement of Level 3's anti-competitive behavior.[3] Using the status quo as the baseline remedy until the parties negotiate a new agreement is the only way to comply with Section 9-250 of the Act and simultaneously to provide an incentive for the two CLECs to negotiate. The terms that comprise the status quo are, in

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[1] Level 3 served copies of its Application for Rehearing on July 27, 2007. Filing was not completed properly until August 6, however. Also on August 6, Neutral Tandem filed a Response to Level 3's Application for Rehearing based upon the July 27 service.

[2] The Order uses the status quo as a backstop in the event that the parties are unable to negotiate terms and conditions for their commercial relationship. *See* Order at 11-12.

[3] *See id.* at 11 n.42; *see generally id.* (discussing violations of Section 13-514 and 13-702 of the Act).

themselves, irrelevant to resolving the issues presented in this case; furthermore, to allow Level 3 to litigate the very terms that it seeks to modify or terminate would provide it a *de facto* victory and reward it for anti-competitive behavior. Rehearing therefore should not be granted on this point.

II.

Level 3 repeatedly asserts that the Order found Level 3 to have acted in bad faith, and that such finding is improper. Level 3 also states:

> the ALJ Order, in large part based on his view that Level 3 acted in "bad faith", erroneously compels Level 3….[4]

The purported quotation by Level 3 is incorrect, as is the entire line of argument that a finding of bad faith was made. Bad faith simply is not discussed anywhere in the Order (nor is the related concept of good faith). From the amount of argument about a topic that was never mentioned in the Order, it appears that Level 3 seeks to substitute an issue of contract law for the conclusions that Level 3's actions were anti-competitive and that they violated Sections 13-514 and 13-702 of the Act. Furthermore, while Level 3 asserts that the Commission lacks authority to "modify, amend, or interfere with contracts,"[5] the Commission explicitly has the authority to enforce the provisions of the Public Utilities Act, including abatement of violations of Sections 13-514 and 13-702.[6]

Level 3 cites *S & F Corp.* as support for the enforceability of termination clauses in contracts. However, that case provides an exception where the exercise of such clause would violate a statute. It states that a termination clause "will be enforced if not contrary to equity and good conscience, *and if not in violation of any limitation imposed by statute*."[7] The Order sets forth the several violations by Level 3 that trigger the exception and erase support for Level 3's argument.

Finally, Level 3 mis-states that it is forced to abide under the prior agreement.[8] What the Order actually requires is that "*Level 3 shall continue to accept a direct physical interconnection* by which NT delivers traffic to Level 3 for termination until a further order from the Commission, and for at least as long as Level 3 maintains a direct physical interconnection by which it delivers traffic to NT for transiting."[9] It is free to negotate a new agreement, so long as it complies with Illinois law.[10] Unlike Level 3's

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[4] AFR at 5.

[5] *Id*.

[6] *See* 220 ILCS 5/4-201.

[7] *S & F Corp. v. American Express Co.*, 60 Ill. App. 3d 824, 829 (Ill. App. Ct. 1978) (emphasis added).

[8] AFR at 5. (Level 3 argues that the "Order … erroneously compels Level 3 to accept traffic under the terminated Traffic Exchange Agreement 'until a further order by the Commission, and for at least as long as Level 3 maintains a direct physical interconnection by which it delivers traffic to NT for transiting.'")

[9] Order at 12.

[10] *See id.* at 11-12.

argument, the Order distinguishes between terminating the *agreement* (e.g., by negotiating a new one) and terminating the *interconnection* (thereby raising costs to competitors to 130%-230% of present rates). Furthermore, the status quo only remains in effect until the parties reach a new agreement.[11]

III.

Level 3 argues that any interconnection "can only be given prospective effect."[12] That is all the Order does, however. In summary, the Order analyzes the threatened conduct in the framework of Article XIII of the Public Utilities Act, and directs the parties to negotiate within certain boundaries. It maintains the status quo only until a new agreement is reached. Furthermore, the Order does not award damages. In addressing the remedies under Section 13-516 of the Act, the Order states that "such damages only would accrue if Level 3 were to actually disconnect NT, which it has not done to date."[13] Level 3 engages in a wandering diatribe about retroactive effects of newly adopted administrative rules, but none of it is responsive to the Order entered in this case. As such, it appears that the entire line of argument fails to state a reason for which rehearing should be granted.

IV.

Level 3 argues that its demand for compensation from Neutral Tandem did not violate the "Illinois Act."[14] As explained in the Order, reciprocal compensation is recognized in the federal statute[15] and further clarified in the FCC's rules.[16] That law has been applied in prior Illinois Commerce Commission cases.[17] The Public Utilities Act is silent about reciprocal compensation, but while Level 3's argument is technically correct, it is non-responsive to the Order, unpersuasive with respect to existing legal authority on the topic, and irrelevant as a basis for rehearing. What is clear is that the obligation to pay reciprocal compensation attaches to the originating carrier and not the transit provider.[18]

V.

Level 3 avers that it "cannot collect reciprocal compensation from originating carriers because there are no tariffs or contracts in place…."[19] This argument must be viewed in the context of the law on reciprocal compensation raised as Issue IV. The evidence of record is that Neutral Tandem provides the necessary information for Level

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[11] *Id*. at 12.

[12] AFR at 7.

[13] Order at 13 n.49.

[14] AFR at 10.

[15] *See* Order at 9, nn. 30-31.

[16] *See* Order at 9, n. 32.

[17] *See* Order at 10, n. 34.

[18] *Id*.

[19] AFR at 11.

3 to collect reciprocal compensation, and the law does not presently allow Level 3 to collect it from a transit carrier.

VI.

Level 3 contends that there is no evidence it relies on Neutral Tandem to deliver transit traffic. This line of argument is irrelevant. Level 3 admitted in its answer that it entered an agreement by which it delivers traffic to Neutral Tandem for transitting, and Level 3 does not challenge the conclusion that its insistence on doubly-indirect interconnection would foreclose from competing CLECs the very arrangement that is available to Level 3.

VII.

Level 3 also argues that it is not discriminatory to use the incumbent LEC to transit traffic. Such argument is non-responsive to the Order. The discriminatory effect is for Level 3 to require Neutral Tandem's customers to incur 130% to 230% of their present cost to deliver traffic to Level 3, while Level 3 would not face such costs for originating traffic to the same CLECs.

[VIII.]

Finally, Level 3 attempts to incorporate into the application for rehearing all of their arguments raised throughout the proceeding.[20] That will not suffice. The rule governing rehearing states that:

> Applications for rehearing must state with specificity the issues for which rehearing is sought. Incorporation of arguments made in prior pleadings and briefs must be specific as to document and page.[21]

Level 3's attempt to incorporate the entire record into its AFR not only ignores the directive of the rule, it also fails to clearly identify a particular issue or to clearly state a basis for which rehearing should be granted. Accordingly, issues not stated with particularity in the AFR (i.e., those not enumerated as I-VII) are waived.

[20] AFR at 1 ("Level 3 also incorporates by reference, and reasserts herein, each of the arguments set forth in its briefs to the Administrative Law Judge, and in Level 3's Petition for Review of the ALJ Order.")

[21] 83 Ill. Adm. Code 200.880(b).